Nos. 18,499 and 18,500

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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B. B. MARGOLIS AND IRIS M. MARGOLIS,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## PETITION FOR REHEARING.

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*Petitioners,*

*vs.*

Commissioner of Internal Revenue,

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## PETITION FOR REHEARING.

*To the Honorable Stanley N. Barnes, Charles M. Merrill, and Ben. Cushing Duniway, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:*

Pursuant to the Court's Rule 23, the petitioners, by their counsel, petition for a rehearing. The Court's opinion and judgment were filed and entered September 11, 1964.

The grounds for the petition are:

1. The Court has not decided a material issue duly presented to it by petitioners, and which the respondent did not dispute. That is, on pages 100-101 of their Opening Brief, the petitioners developed the point, based on the respondent's own regulation (Section 1.1031(a)-1(a)) that if any property transferred in an exchange meets the requirements of Section 1031, then *all* properties transferred in the exchange are covered by the

statutory non-recognition of gain provisions. Yet the Court's opinion [see, for example, the first paragraph on page 7 of the slip opinion] erroneously restricts the non-recognition of gain in the Sachs and Levikow exchanges to "commercial" properties transferred, ignoring the "residential" lots transferred (an aggregate of 4 out of the 11 lots involved). It is submitted that the entire gain on the Sachs and Levikow exchanges is entitled to non-recognition.

2. The Court has not covered one material aspect of the Tracts 473 and 482 matter (Kearney Park notes and land sale). Under the June 15, 1956 contract referred to in the Court's opinion, the two trusts (and the petitioners, to the extent of their interests therein) were entitled to be reimbursed for advances made to pay bonds and taxes on Kearney Park land. Petitioners share of these advances was $13,230.50, and it seems obvious that petitioners cannot be held to have realized income to the extent the sums received by petitioners from Sutherland are attributable to a reimbursement of the cash advances made by them. The Court is requested to state this explicitly to avoid confusion on remand.

3. The Court's opinion specifically recognizes that petitioners held and regarded commercial and industrial property as investment property *not* held primarily for sale to customers in the ordinary course of trade or business [pages 6-7 of the slip opinion]. *All* of the property involved in the Trusts 473 and 482 issues (Kearney Park notes and land) was zoned as commercial and industrial property [stipulation par. 107; Record p. 78]; and it is undisputed that the extension of the Navy flight pattern effectively prevented residential use of the land [Tax Court Findings, Record p. 129]. If, as

the Court held, the trusts may be disregarded [Slip opinion, p. 14] then petitioners must be regarded as holding an equity interest in *investment* property, since the Court recognized that petitioners had never been in the business of selling commercial or industrial properties; consequently any gain realized was properly reported as capital gain, and the Court should so hold.

For the reasons stated, the granting of this petition for rehearing is justified.

Respectfully submitted,

HARRISON HARKINS,

*Counsel for Petitioners.*

## Certificate.

The within Petition for Rehearing is well founded, not interposed for delay, and is made in a good faith attempt to expedite the disposition of the case on remand.

HARRISON HARKINS,
*Counsel for Petitioners.*

No. 18505 and 18776

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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No. 18505

UNITED STATES OF AMERICA,

*Appellant,*

*vs*

MONOLITH PORTLAND MIDWEST COMPANY,

*Appellee,*

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No. 18776

MONOLITH PORTLAND CEMENT COMPANY

*Appellant,*

*vs.*

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District,

*Appellee.*

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## Taxpayers' Petition for Rehearing and Suggestion That Rehearing Be Before the Court Sitting En Banc.

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## Taxpayers' Petition for Rehearing and Suggestion That Rehearing Be Before the Court Sitting En Banc.

---

*To the Honorable Stanley N. Barnes and Gilbert H. Jertberg, Circuit Judges; and Ray McNichols, District Judge:*

Taxpayers respectfully request the Court to grant a rehearing and suggest that the rehearing be *en banc.*

This Court has construed the Supreme Court's summary discussion and determination of the single certiorari question presented in *Riddell v. Monolith Portland Cement Company,* 371 U. S. 537, reh. den. 372 U. S. 832, and its general, unqualified reversal "for disposition in accordance with this opinion", as automatically and *sub silentio* foreclosing Monolith's vital

right to be heard and to present evidence on the remand on all the other questions in the case.*

We submit that such revolutionary contraction by implication of the traditional right on remand to a full, fair hearing on issues not reached by the Supreme Court, so transcends the issues of this particular case as to merit reconsideration by the entire Court. In support thereof, we submit the following:

1. Many important questions in issue in the original district court proceeding were never decided. One of these questions was whether, even if Monolith's limestone were found to be customarily sold in crude, crushed form, Monolith's conventional sintering process** was an allowable "mining" process, as the statute expressly and specifically commanded. §114(b)(4)(B)(iii).*** Since the District court found that Monolith's

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*No hearing of any kind was ever held in the district court following the remand. Instead, by minute order, the district court spread the Supreme Court's mandate, and calling for new findings, conclusions and judgment [R. 746], rejected those proposed by Monolith [R. 803] and accepted the Government's [R. 828], after interlineating the notation that such procedure was required by the mandate [Clk. Tr. pp. 704, 706]. In the constitutional sense, *Akron C. & Y. R. Co. v. United States,* 261 U.S. 184, 200, Monolith has thus yet to be heard.

**"The process of burning and sintering or calcining of the calcium carbonate rock . . . in the rotary kiln." *California Portland Cement Co. v. Riddell,* 3 AFTR 2d 438, 442, S.D. Cal. 1958. Although reversed on another point, this Court acknowledged the potential issue, *Riddell v. California Portland Cement Co.,* 297 F. 2d 345, 354, in response to Monolith's *amicus curiae* brief, stating: ". . . Thus, if calcium carbonate falls within (iii), then sorting, concentrating, sintering and loading for shipment are proper items to be included if any such treatment has taken place."

***"The term 'mining' as used herein shall be considered to include not merely the extraction of the minerals from the ground but also the ordinary treatment processes . . . The term 'ordinary treatment processes,' as used herein, *shall include* . . . (iii) in the case of . . . minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and *sintering* . . ." (Italics added)

limestone was not marketable in crude [crushed] form (i.e., prior to finished cement) [R. 171-172], it did not reach the contingent question of allowable "mining" processes for clause (iii) minerals. Neither did this Court, since it accepted the non-marketability finding; *R A. Riddell v. Monolith Portland Cement Company,* 301 F. 2d 488, 494-95, 9 Cir. 1962.

The Supreme Court found (contrary to the courts below) that Monolith's limestone was a clause (iii) mineral—one customarily sold in the form of a crude [crushed] mineral product—and hence "controlled by Cannelton" (371 U. S. 537, 538). However, while in *Cannelton,* the clause (iii) findings were dispositive, since the taxpayer neither used nor claimed the processes specified by § 114(b)(4)(B)(iii); the Supreme Court's clause (iii) finding in *Monolith* automatically reactivated the contingent "sintering" issue, as to which Monolith then became entitled to a hearing.

However, on remand, the district court dismissed Monolith's complaint without ever affording Monolith a hearing and an opportunity to present evidence on or urge additional available issues (such as "sintering"), not within the compass of the mandate *Sprague v. Ticonic Nat. Bank,* 307 U. S. 161, 167.*

In its primary sense, due process requires a hearing before judgment. The maxim "audi alteram partem" —hear the other side—is a constitutional command. This Court is not at liberty to grant or withhold due

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*Naturally, error was assigned [R. 846-847], and urged in the briefs (*e.g.,* Opening Brief, pp. 30-31, 41). The issues not considered by the Supreme Court, as to which Monolith claims lack of hearing constituting denial of due process, fall into three classes: (1) issues not yet decided by *any* court (such as "sintering"); (2) issues decided by the district court but passed by this Court (*res judicata*); (3) issues which formed this Court's alternative bases for decision (non-retroactivity, "existing law").

process, which the Constitution commands for all, merely in accordance with its view of the merits. *Eubanks v. Louisiana,* 356 U. S. 584, 589. The summary procedure by which (after the case had been summarily decided upon an entirely new ground in the Supreme Court), Monolith was denied an opportunity on the remand to present evidence upon or urge other important issues not before the Supreme Court (such as "sintering"), violates the due process guaranteed to all by the Fifth Amendment to the Constitution, which includes a meaningful hearing prior to judgment on remand, *Saunders v. Shaw,* 244 U. S. 317, 319; *Morgan v. United States,* 304 U. S. 1, 19; *Akron C. & Y. R. Co. v. United States,* 261 U. S. 184, 200.

2. This Court has decided the important question of the legal scope of a summary *per curiam* opinion of reversal by the Supreme Court in conflict with decisions of the Supreme Court,* and contrary to the Supreme Court's certiorari jurisdiction and published rules

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*Based on the venerable principle that "no inference can be drawn from silence when there is no duty to speak", *United States v. Commissioner of Immigration,* 273 U. S. 103, 112, "A judgment of reversal by an appellate court is not necessarily an adjudication of any other than the questions in terms discussed and decided." *Mutual Life Insurance Co. v. Hill,* 193 U. S. 551. "Questions which merely lurk in the record" are not foreclosed by a general reversal, *KVOS v. Associated Press,* 299 U. S. 269, 279; *Charles Wolff Packing Company v. Court of Industrial Relations,* 267 U. S. 552, 562; *Communist Party of U. S. v. Subversive Act. Con. Board,* 254 F. 2d 314, 321-322, C. A. D. C. 1958. A decision of the Supreme Court is authority only for questions which *were* decided, *Cohens v. Virginia,* 6 Wheat. 264; it does not foreclose questions which *might* have been decided. "Certainly omissions do not constitute a part of and become the law of the case, nor does a contention of counsel not responded to." *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 136. Instead, alleged questions not dealt with in the Court's opinion remain for consideration below upon a reversal and remand. *Cities Service Oil Co. v. Dunlap,* 308 U. S. 208, 211-213.

of practice and procedure,* thus depriving Monolith of due process.** The answers to questions the Supreme Court has avoided deciding in advance of necessity by the *per curiam* device may not be supplied by the lower courts by interpretative implication.

Respectfully submitted,

JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
BILL B. BETZ,
*Attorneys for Monolith Portland Cement Cement Company and Monolith Portland Midwest Company.*

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*By the Judges Act of 1925 (43 Stat. 936), the "right" to appeal federal civil cases to the Supreme Court (and the Court's correlative "duty" to hear and decide them) was abolished, and plenary, discretionary certiorari jurisdiction was conferred upon the Court in its place. Thus, while the Supreme Court has the *power* to correct *any* error below, 28 USC §2106, there is no correlative duty to do so, and the fact that the Court has the power (jurisdiction) will thus not support the inference that the power has been exercised, *Williams v. Georgia,* 349 U. S. 375, 389. It is true that on certiorari the respondent may urge issues in controversy in the Court of Appeals, *United States v. Carignan,* 342 U. S. 36, 38; and the Supreme Court *may* decide that the judgment should be affirmed on such alternative grounds, *United States v. Curtiss-Wright Export Corp.,* 299 U. S. 304, 330. However, while under Rule 24(1), Revised Rules of the Supreme Court), failure to urge such a ground may automatically preclude the Court's consideration thereof, *Weiner v. United States,* 357 U. S. 349, 351, the Supreme Court is under no compulsion to decide, any such additional issues. On the contrary, the Court "confines itself to the ground upon which the writ was asked or granted", *Helis v. Ward,* 308 U. S. 365, 370. Issues considered by the Court are "fixed by the petition", *Irvine v. California,* 347 U. S. 128, 129. Indeed, the Court has recently held that where an additional issue is brought to the Court's attention by the respondent, "under our rules it is not before us." *Namet v. United States,* 373 U. S. 179, 190.

**Since the Supreme Court is the Nation's law-maker in this area of federal appellate procedure, due process requires that traditional forms of fair procedure must not be restricted by implication or the most explicit action by the Supreme Court. *Greene v. McElroy,* 360 U. S. 474, 508.

## Certificate of Counsel.

The undersigned, one of the attorneys for the petitioners, states that in his judgment this petition is well-founded and is not interposed for purposes of delay.

NORMAN ELLIOTT